No. 332. 1896. 76.

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Brief of Kittredge & Wiley

Filed Aug 3, 1896

Supreme Court of the United States.

THE CINCINNATI, HAMILTON, CHICAGO, & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Executor of Charles B. Lynde, Deceased,
Defendant in Error.

No. 332.
October Term, 1896.

Brief for Defendant in Error on Motion to Dismiss Writ of Error.

E. W. KITTREDGE,
JOSEPH WILEY,
Counsel for Defendant in Error.

W. H. Anderson & Co., Law Publishers, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Executor of Charles R. Lynde, deceased,
Defendant in Error.

No. 552.
October Term, 1896.

MOTION TO DISMISS WRIT OF ERROR.

Now comes the defendant in error, The Long Island Loan and Trust Company, Executor of Charles R. Lynde, deceased, and moves the Court to dismiss the writ of error in this cause for want of jurisdiction, for that no federal question is presented by the record.

And the defendant further moves the Court to affirm the

judgment of the Supreme Court of Ohio, for that, although the record may show that this Court has jurisdiction, it is manifest that the writ of error was taken for delay only, and that the question on which such jurisdiction depends is frivolous.

E. W. KITTREDGE,
JOSEPH WILBY,
Counsel for Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR UPON MOTION TO DISMISS; AND TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF OHIO.

This suit was originally brought by Charles R. Lynde in the Court of Common Pleas of Franklin County, Ohio, to foreclose a mortgage dated November 1, 1864, given by The Columbus & Indianapolis Central Railway Company to Archibald Parkhurst, Trustee, to secure, among others, certain negotiable bonds held by Charles R. Lynde. The plaintiff in error herein was made defendant in that suit. By its answer, among other things, it averred that on the 20th day of February, A. D. 1868, said railway company executed and delivered a second mortgage to secure certain bonds to James A. Roosevelt and William R. Fosdick, Trustees; that subsequently, on the 1st day of February, 1875, Roosevelt and Fosdick, Trustees under the second mortgage, filed a bill in the Circuit Court of the United States for the Southern District of Ohio, and in the Circuit Court of the United States for the District of Indiana, to foreclose the second mortgage; and that receivers were appointed in said cause, who took possesson of the property, which was subsequently sold under a decree of foreclosure, and under which sale the plaintiff in error claims title.

Neither Charles R. Lynde, nor anyone representing him,

was a party to this foreclosure suit, the object of which was to foreclose the junior mortgage subject to the prior mortgage to A. Parkhurst, Trustee. The answer further alleged that in 1878, pending the foreclosure suits in the Circuit Courts of the United States, the bonds of Charles R. Lynde were issued and sold by The Columbus & Indianapolis Central Railway Company, the mortgagor, or its successor by consolidation. It further averred that in the decree of foreclosure in the Circuit Court of the United States it was considered and adjudged that the sale ordered to be made should be valid and effectual forever, and that the defendants in the said suits and all persons claiming, or to claim, under them subsequent to the beginning of said foreclosure suits, as encumbrancers or otherwise, should be and thereby were forever barred from all right or interest in or to the premises so sold.

A reply was filed by Charles R. Lynde in the Franklin County Common Pleas Court containing, among other things, a general denial of these allegations of the answer of the plaintiff in error.

At the trial of this cause in the Franklin County Common Pleas Court no bill of exceptions was taken by the present plaintiff in error, but the trial court made a special finding of facts, and, among others, the following:

"XXI. On the first and second days of February, 1875, the said James A. Roosevelt and William R. Fosdick, Trustees under the mortgage to them hereinbefore described, commenced their actions for the foreclosure of said mortgage, and for other purposes, but not affecting the Park-

hurst mortgage aforesaid, or the bonds thereby secured, concurrently in the Circuit Courts of the United States for the Southern District of Ohio, the District of Indiana, and the Northern District of Illinois. In said actions one William L. Scott appeared and filed his cross bill in October, 1881, claiming to be the owner of certain bonds secured by the mortgage to said Roosevelt and Fosdick, and praying, among other things, for the foreclosure of the same mortgage, but asking no relief against said Parkhurst mortgage or the bonds secured thereby."

There was no allegation in any of the pleadings in the cases in the United States Circuit Courts in respect to the mortgage of The Columbus & Indianapolis Central Railway Company to Archibald Parkhurst dated November 1, 1864, nor in respect to the bonds therein described; and no issue was joined in respect to the same; nor was said Archibald Parkhurst, as Trustee or otherwise, called upon to set up his interest in said railroad property.

Messrs. Roosevelt and Fosdick were appointed receivers of the said railroad in said cases to "receive the rents from the lessees of the railroad," but they were directed not to disturb the possession by the lessee of the mortgaged premises.

In the decree of foreclosure in these cases it was ordered and adjudged that the property should be sold subject to the outstanding sectional bonds prior in lien to the mortgage of said Roosevelt and Fosdick, and to all other, if any, paramount liens thereon; but free from the lien of the said mortgage to Roosevelt and Fosdick; and that nothing in said decree should in any manner affect, preju-

dice, or preclude the holders of said paramount liens, or any of them, but that said decree should be without prejudice to the right of them and each of them.

The Common Pleas Court of Franklin County, Ohio, rendered a judgment in favor of Charles R. Lynde, which judgment was affirmed by the Circuit Court of Franklin County; which latter judgment was affirmed by the Supreme Court of Ohio.

If we understand the federal question supposed to be raised upon this record, it is that the "state court refused to give effect to the judgment of a court of the United States, rendered upon a point in dispute, and with jurisdiction of the case and of the parties."

It is obvious that, as neither Charles R. Lynde nor any person representing him was a party to these foreclosure suits in the Circuit Courts of the United States when Mr. Lynde acquired his bonds, and as no issue was made in said cases in respect to the Parkhurst mortgage or the bonds secured thereby, there is nothing in the judgment rendered in those cases that can affect the rights of these bondholders.

The courts of Ohio found that the bonds in question were in the hands of Charles R. Lynde as a bona fide holder for value before due, and became a valid lien upon the property from the time in 1864 when they were certified to by Mr. Parkhurst as Trustee, and the mortgage was recorded by the mortgagor.

They also found that the bonds were sold by the presi-

dent of the mortgagor company, in whose custody they had been placed at the time of their execution. This sale by the president was after the appointment of a receiver in the suit to foreclose the Roosevelt and Fosdick mortgage. The claim was made that the title of Charles R. Lynde was affected by the pendency of this foreclosure litigation.

But the state court decided that not only did the decree of sale in these foreclosure suits expressly reserve the right of the bondholders under the Parkhurst mortgage, but they also decided that the doctrine of *lis pendens* has no application to commercial paper. They held that the lien of Charles R. Lynde as a bona fide purchaser was not affected by these foreclosure suits, to which he was not a party, and of which he had neither actual nor constructive notice.

These findings and conclusions present no federal question; and they are in accord with the settled doctrine of the Supreme Court of the United States.

County of Warren vs. Massie, 97 U. S. 96;
County of Cass vs. Gillette, 100 U. S. 585;
Carroll County vs. Smith, 111 U. S. 556;
Claflin vs. S. C. R. R. Co., 8 Fed. Rep. 118;
Farmers L. & T. Co. vs. T. & S. H. R. Co., 54 Fed. Rep. 759.

No record of the foreclosure cases in the federal courts, or of the issues joined in those cases, is contained in the record of the case in the state court, but it is expressly shown by the stipulations of the parties and the findings of the

court that no relief was sought in those cases against the Parkhurst mortgage, or the holders of the bonds secured thereby, and that no issue was joined in respect to that mortgage.

We respectfully submit that there is nothing in the record to show that any title or right, under any judgment of any court of the United States, with jurisdiction of the case and of the parties, rendered upon a point in dispute, has been denied by the decisions of the state courts. There is, therefore, no federal question presented by this record.

As the decision of the case, by the Supreme Court of Ohio, has not yet been reported we print a copy of it from advance sheets as an appendix to this brief. It will clearly appear from this opinion that no federal question was presented to, or decided by, the Supreme Court of Ohio in the determination of this case.

Respectfully submitted,

E. W. KITTREDGE,
JOSEPH WILBY,
Counsel for Defendant in Error.

(THE SUPREME COURT OF OHIO.)

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, EXECUTOR OF CHARLES R. LYNDE, ET AL.

1. The bonds of an Ohio railroad corporation payable in New York City to bearer are negotiable without endorsement, although sealed with the corporate seal, notwithstanding that they were made in 1864, while Section 1 of the Act of 1820 (S. & C. 862) in relation to negotiable paper was in force.

2. Where such bonds are secured by a mortgage on the roadway and other property of the maker, executed to a trustee for that purpose, and are issued at different times, the lien of all the bonds outstanding, in the hands of bona fide holders for value, are equal in priority, the lien of each bond dating from the record of the mortgage that secured it and not from the time it was issued.

3. Where such bonds, complete in form, and negotiable by delivery, are placed in the custody of the president of the company he thereby becomes clothed with an apparent authority of disposition. In such case, if the custodian, without the consent or knowledge of the company, wrongfully and for his own benefit negotiates them, and in due course of business before due, to one who pays therefor their fair value, without notice of any restriction on such apparent power of disposition, the transaction confers upon such purchaser a valid title to the bonds so purchased, and

entitles him to a lien against the mortgaged property for their payment.

4. Where such mortgage contains a condition providing that in case the company defaults for more than six months in the payment of interest on such bonds, they shall immediately become due and payable, and such default is made, Query: Whether such default alone, without any steps being taken by any holder to enforce the provision, is such a dishonor of the bonds as to destroy their negotiability. But whether this default would have such effect or not, if the interest is afterwards paid in full the negotiability of the bonds is thereby restored.

5. The doctrine of *lis pendens* does not apply to negotiable paper transferred before due in due course of business for value.

Error to the Circuit Court of Franklin County.

This action was brought in the Court of Common Pleas of Franklin County by defendant in error, Charles R. Lynde, against The Pittsburg, Cincinnati, Chicago & St. Louis Railway Co., plaintiff in error, and others, to recover upon thirty-six bonds of one thousand dollars each, made in 1864, by The Columbus & Indianapolis Central Railway Company, which bonds were a part of a series of one thousand bonds secured by a mortgage on the roadway and other property of the company by which they were made. The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company by answer denied the validity of the bonds in controversy, setting forth a judicial sale and a series of consolidations of different railroad companies by which the mortgaged property became vested in it, and praying that the title to this property be quieted against the lien claimed on behalf of these bonds. Upon the trial in the Court of Common Pleas of the issues joined between the plaintiff there and the answering defendant, The Pittsburg, Cincinnati, Chicago & St. Louis Railway

Company, the plaintiff prevailed, the court holding that the bonds sued upon were valid obligations of the railroad company that made them, and a lien upon the mortgaged property in the hands of the answering defendant. The defendant, The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, now plaintiff in error, with a view of excepting to the decision, requested the Court of Common Pleas to state its findings of fact separate from its conclusions of law. This was done. The cause was then taken to the Circuit Court, where the judgment of the Common Pleas was affirmed, whereupon The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company brought the cause to this court for review. A statement of facts necessary to the decision of the case will be found in the opinion of the court.

Watson, Burr & Livesay, and Lawrence Maxwell, Jr., for plaintiff in error.

Kittredge, Wilby & Simmons for defendant in error.

BRADBURY, J.

The contention between the parties assumes a twofold form: One respects the title that the defendant in error acquired to the bonds in controversy. If he acquired no title to them as against the obligor, nor against either of the consolidated companies into which the obligor became merged by the consolidation that afterwards occurred, he must fail in the action. If his title is valid against the obligor, or against either of the consolidated companies formed before the bonds were negotiated, then the second contention arises, which relates to the lien claimed for these bonds, on the mortgaged property, this property having passed into the ownership of plaintiff in error.

The evidence discloses no marked dispute over the main facts of the case, and the trial court could have encountered no serious difficulty in ascertaining them. Doubtless, as the defendant in error contends, the evidence submitted to the trial court would have authorized the finding of

some additional facts that bear favorably for him, upon a general view of the equities of the case, but their character and importance were not controlling, and in the view we have adopted they become immaterial.

The finding of fact made by the Court of Common Pleas was both comprehensive and minute, embracing many circumstances and details formal in their character, though doubtless most of them were indispensable to a determination of the contention between the parties. It covers thirty pages of the printed record. The repetition of only a small part of this statement is required as a basis for our conclusions. On November 1, 1864, The Columbus & Indianapolis Central Railway Company, a corporation under the laws of the States of Indiana and Ohio, authorized the execution of one thousand of its bonds, each of the denomination of one thousand dollars, payable November 1, 1904, bearing seven percent interest, payable semiannually, these payments of interest being evidenced by coupons attached to the bonds severally. These bonds were duly executed, being signed by the president, attested by the secretary of the company, and the corporate seal attached. They were made payable to William D. Thompson, or bearer, in New York City. Each bond contained this provision: "This bond shall be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and being so registered it shall then be transferable only on the books of the company until released from such registry on said books by its owner. This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it duly signed by the trustee." The bonds were secured by a mortgage conveying the roadway and other property of the makers to A. Parkhurst in trust for that purpose. It is a certificate of this trustee that is declared necessary to render them obligatory.

This authentication was duly made on each bond by the following certificate:

"I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned. A. Parkhurst, Trustee."

The statement that the bonds should not become obligatory until thus authenticated is equivalent to a declaration that when duly executed by the company, and so authenticated, their obligatory character shall become complete. They then became perfect in form, and by their express terms transmissible by mere delivery.

Eight hundred and twenty-one of these bonds were duly negotiated on behalf of the company. The remaining one hundred and seventy-nine, of which the thirty-six in controversy were part, were, as early as 1870, placed in the custody of Benjamin E. Smith, the president of the company, and remained in his custody until the year 1875, when, in November or December of that year, he borrowed for his own purposes certain sums of money, amounting to $48,000, from W. H. Newbold, Son & Co., a firm of brokers in the city of Philadelphia, for which he executed and delivered to them his individual notes, and at the same time, falsely pretending to the said W. H. Newbold, Son & Co. that he was individually the owner of said bonds, delivered certain of said bonds, including the thirty-six bonds described in the plaintiff's petition, to the said W. H. Newbold, Son & Co. as collateral security for the payment of his said notes.

Thereafter the said Smith renewed his notes with the same collateral from time to time, until about the 14th day of January, 1878, when the bonds so held as collateral security were sold by the said W. H. Newbold, Son & Co., and the proceeds applied to the payment of said notes, and the balance paid over to the said Smith, or for his use, and no part of the same was used for the benefit of said railway company.

At the time the said bonds were so pledged to the said W. H. Newbold, Son & Co., all the past due coupons had been cut off, and while they were so held as collateral se-

curity the subsequent coupons as they came due were cut off from the said bonds and delivered to the said Smith, but the same were never presented for payment.

At the sale of said bonds the said W. H. Newbold, Son & Co. themselves became the purchasers of all said thirty-six (36) bonds, paying the full market price at the time of the purchase, and buying them in good faith, without knowledge of any defect in them or any of them; and thereafter they sent the said thirty-six bonds to New York for sale.

Plaintiff, in the months of May, July, and August, 1878, purchased said thirty-six bonds in good faith in the usual course of business, for valuable consideration, being about ninety cents on the dollar, which was at the time the usual market price for the bonds secured by said second mortgage, and without knowledge or notice of any of the unauthorized or fraudulent acts of said Smith concerning said bonds, and without any knowledge or notice that said bonds had not been sold by the said Columbus & Indianapolis Railway Company, and thereby became and is now the bona fide holder and owner of said thirty-six bonds and the coupons thereto belonging, described in the petition; and that before said thirty-six bonds had been purchased by plaintiff, the Railway Company had not made default in the payment of the interest on said thirty-six bonds, and no holder of said bonds prior to said plaintiff had elected that the principal sum thereof should become due.

At the time when the plaintiff purchased said thirty-six bonds the coupons belonging thereto due May 1, 1878, were still attached to the said bonds, and were unpaid.

On or about the 27th day of August, 1878, the plaintiff presented the said thirty-six bonds for registration to the secretary of the Union Trust Company, New York, which company had been theretofore designated by said Columbus, Chicago & Indiana Central Railway Company as its registering agent for said bonds in the city of New York, to put the bonds in the name of the party registering them and taking them out of the register and making them to

bearer; and the secretary then caused the same to be registered in the name of Charles R. Lynde. At the time of said registration no inquiry was made by the said secretary as to whether or not the said bonds had been regularly issued by the said Columbus & Indianapolis Central Railway Company.

From the year 1871 until after the purchase by the plaintiff of the thirty-six bonds described in the petition the plaintiff held and owned other bonds secured by the said mortgage of the Columbus & Indianapolis Central Railway Company to Archibald Parkhurst, trustee, described in the petition being some of the 821 bonds hereinbefore described. The said Columbus, Chicago & Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 bonds due on the first day of May, 1875, and on the first day of November, 1875, and the said interest coupons were not paid until after June 30, 1876, when the same were paid by or on behalf of the said receivers hereinbefore mentioned, all which facts were known to the plaintiff at the time he purchased the said thirty-six bonds described in the petition. No authority or consent was ever given by the board of directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or the sale of the said 179 bonds or any of them.

Before this negotiation was had, the obligor, The Columbus & Indianapolis Central Railway Company, had, by two separate schemes of consolidation, become merged into The Columbus, Chicago & Indiana Central Railway Company, which latter corporation, by force of the consolidations, had become the owner of the property of the obligor, which was pledged to pay these bonds. Said Benjamin E. Smith, being continuously the president of the successive companies, and as such president had the bonds in his custody. This negotiation and pledging of said bonds was had without the knowledge, consent, or authority of said Columbus, Chicago & Indiana Central Railway Company, or of its constituent companies.

The title of defendant in error to the bonds in controversy rests upon the facts thus recited. Plaintiff in error contends, among other things, that the facts thus stated show that neither the maker of these bonds nor the consolidated companies into which it became merged consented to this sale or delivery of the bonds, and as an owner can not be deprived of his property without his consent no title passed.

It is true that these bonds were negotiated to Newbold and son without the knowledge or consent of the company that made them, or the knowledge or consent of any of the companies into which it became merged by the several consolidations mentioned. But such consent and knowledge is not indispensable to pass the title to negotiable instruments. Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such transaction as the finding of fact shows occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. Railway Co. vs. Sprague, 103 U. S. 756; Fearing vs. Clark, 15 Gray, 74.

Independently of the rule of law designed to protect and give currency to negotiable paper, those principles of natural justice universally applicable to the affairs of mankind, when applied to this transaction, would seem to demand the protection of the defendant in error as against the maker of the bonds, and all who stand in its shoes. He was wholly free from fault in connection with the transaction. Each bond contained a declaration of its transmissibility from hand to hand by mere delivery. He

found them for sale before they were due, in the market where such securities are usually offered for sale, and bought them at their fair market value, without notice of any infirmity in their title. Soon thereafter he took them to the Union Trust Company, in New York City, the agents of the maker, specially appointed to register its bonds, and caused them to be registered in his name on its books. What more could even the highest degree of prudence or diligence demand of him?

On the other hand, the maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly-defined, powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee, and containing an express declaration of their transmissibility from hand to hand by mere delivery. He was, up to and long after the time these bonds were negotiated, continued as president of the different consolidated companies as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance. Under these circumstances what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so entrusted to him?

If the maker of these bonds and those who must abide by their title can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds it must be by the application of some stern rule of law founded upon considerations of public policy.

The contention against the negotiability of these bonds rests upon a statute passed in 1820 (S. & C. 862), and in force when the bonds in question were made and negotiated.

"Section 1. Be it enacted by the general assembly of the State of Ohio, that all bonds, promissory notes, bills

of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by endorsement thereon, so as absolutely to transfer and vest the property thereof in each and every indorsee successively; but nothing in this section shall be consrtued to make negotiable any such bond, note, or bill of exchange drawn payable to any person or persons alone, and not drawn to order bearer or assigns."

In 1846 this court, notwithstanding the terms of the statute, held, in Avery vs. Latimer, et al., 14 Ohio St. 542, that a promissory note payable to bearer was negotiable by mere delivery, but that a sealed instrument in the same form was not a promissory note, and is only negotiable by endorsement. Cushman vs. Welsh, 19 Ohio St. 536, and Osborn vs. Kistler, 35 Ohio St. 99, assert the same rule respecting the necessity of an endorsement to transfer title to a sealed instrument in the form of a promissory note payable to bearer.

In Avery vs. Latimer, et al., supra, the court was of opinion that the language of the statute just quoted (S. & C. 862) was such that if it had been recently enacted its terms would have compelled them to hold that an endorsement of a promissory note was necessary to its negotiability in all instances, whether sealed or not. But in deference to a long-continued practice to the contrary the court held the endorsement to be unnecessary to the transfer of a promissory note (not under seal) payable to bearer. We think the same considerations, based on a similar long-continued practice in regard to railroad bonds, together with the express declaration of transmissibility appearing on the face of the bonds in controversy and the manifest necessity of the quality of negotiability by mere delivery to their availability to accomplish the object expected of them, would require us to hold them to be negotiable by mere delivery, even if of the opinion that they were sealed instruments according to the strict construction of that

statute. But whatever the court might hold upon the question just suggested may be regarded as speculative, for we are of the opinion that the attachment of the corporate seal did not stamp upon them the character of sealed instruments within the meaning placed upon that term by the decisions of this court before cited. Avery vs. Latimer, et al., 14 O. 542; Cushman vs. Welsh, 19 Ohio St. 536; and Osborn vs. Kistler, 35 Ohio St. 99.

In those cases the instruments were made by natural persons, who signed their names and also affixed or adopted a private seal, thereby manifesting a purpose to place them in the class of sealed instruments, and the court dealt with them according to the character thus expressly stamped on them by the parties.

In the case of railroad or other corporate securities, however, the attaching of a corporate seal bears a strong analogy to the signature of a natural person, and is its substantial equivalent. In view of the vast sums of money represented by this class of securities and of the existence of a practice of passing them from hand to hand by delivery so universal and long continued as to be within the common knowledge of everyone, they should not be shorn of this valuable attribute on this account unless the words of the statute and the former decisions of the court imperatively require it, which we do not think they do. Besides, the bonds in question are payable in New York. The contract was to be performed there. All parties must be deemed to have had the law of the place of the performance of the contract in view, and we are cited to no statute or decision of the courts of that state that take from these bonds the quality expressly given them in direct terms of transmissibility by delivery. We therefore hold the bonds to have been negotiable by delivery.

At the time Lynde purchased the bonds in controversy, and for some years before, he owned some of the 821 conceded to have been genuine. In 1875, more than two years before Lynde purchased those in controversy, default

was made in the payment of interest on those that were genuine, and as Lynde owned some of them he was chargeable with notice of such default. This default, it is claimed, rendered them overdue and therefore dishonored.

It is true that the mortgage by which the bonds were secured contained the following provision: "And it is further agreed by the party of the first part that in case the said company for the term of six months shall make default of the payment of its interest warrants, or any of them, then the whole principal money contained in said bonds shall become due and payable."

The default consisted in the nonpayment of the interest due for May and November, 1875, and continued until June 30, 1876, a period of more than six months. The entire interest, however, was paid on the day last named. In the meantime no steps were taken to enforce any rights growing out of this default.

This payment of the overdue interest was made more than two years before the purchase by defendant in error of the bonds in controversy. Even if the holders of the bonds were chargeable with notice of this provision in the mortgage (no such provision appearing on the bonds), and that provision was self-operating, so that a mere default of six months in the payment of an installment of interest dishonored the bonds by making them overdue, this taint should be regarded as removed by a subsequent payment of interest to the acceptance of all the bondholders, and therefore the quality of negotiability should be deemed to be restored.

We are therefore of opinion that the title of defendant in error to the bonds in controversy is valid.

We now come to the question respecting the lien claimed for these bonds upon the property mortgaged to secure them, which property has passed into the ownership of plaintiff in error.

The case of Bailey vs. Smith, 14 Ohio St. 396, is cited by plaintiff in error as decisively determining the question

of the lien of the bonds in controversy upon the mortgaged property adversely to the claim of a lien. We are not disposed to depart from the doctrine established by that celebrated case; it has become a rule of property in this state that should not be lightly disturbed, and, besides, is founded upon considerations that appeal strongly to feelings of natural justice. That case does not deny the right of a bona fide holder of negotiable paper to enforce it against the maker, though the latter may have been induced by fraud to make or part with it, but it does deny the right of such holder to enforce a mortgage given to secure such paper if the mortgage also was procured by fraud. In that case the note and mortgage were both procured from the maker by fraud, and that circumstance is the predicate of the decision. What the decision might have been if fraud had intervened only in respect to one of the two instruments present in that case is a subject about which we may speculate, and upon which different minds might reach opposite conclusions. The reasoning of the learned judge, as I gather it from his opinion, leads me to the belief that he would have reached the same conclusion had the mortgage alone been tainted with fraud, but possibly to a different one if the mortgage had been free from fraud, though the note was tainted.

However this may be, there are considerations growing out of the nature of the transaction in that case that distinguish it from the one under consideration. That transaction occurred between private persons, and consisted of a single note, secured by a mortgage on a tract of land. The learned judge having in view these circumstances said: "Now, mortgages are not necessities of commerce. They have none of the attributes of money; they do not pass in currency in the ordinary course of business; they are securities or documents for debts due for the purpose of investments, and unavoidably requiring from those who would take them with prudence and safety inquiry into the value, condition, and title of the property upon which

they rest; nor have we the least apprehension that commerce will be impeded by requiring the further inquiry of the mortgagor, whether he pretends to any defense before a court will foreclose his right to defend against those which have been obtained by force or fraud. * * * A long experience has demonstrated that they are not necessary instruments of active trade and business, and we but follow in the footsteps of the oldest and wisest judges when we say that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should not be applied to them. * * * If they are assigned either expressly or by legal implication, the assignee takes only the interest the assignor had in the instrument * * *."

This language and course of reasoning, perfectly appropriate to the transaction then under consideration, would be strangely out of accord in discussing the principles that should determine the rights of bona fide holders of railroad bonds. These latter are instruments of trade and commerce in the broad sense of those terms; they are designed for sale in the money markets of both Europe and America; they are made payable to bearer for the express purpose of facilitating their negotiability. In the case of the bonds under consideration they declare on their face the fact of their transmissibility by mere delivery. The mortgage is made to a trustee for the benefit of every bond into whomsoever's hand it may chance to pass, and its sole purpose is to give value to these bonds in the money marts of the world. Prospective purchasers of these bonds do not and can not make such specific inquiry and examination into the condition of the mortgaged property as may be made by a purchaser of a note and mortgage under the circumstances supposed by the learned judge.

It might be entirely practicable, and the dictates of prudence might require of one about to purchase a note and mortgage of the mortgagee that he inquire of the maker the circumstances under which they originated, but to require this inquiry of one who, in a distant city, is

about to purchase a railroad bond offered for sale in the market would be to defeat the purpose for which they were designed. Therefore we do not think the case of Baily vs. Smith, supra, applicable to the case under consideration.

The roadway and other property pledged by the mortgage to secure the payment of these bonds subsequent to the making of the mortgage passed by two successive railway consolidations, one made in 1867, the other in 1868, into the ownership of a corporation known as The Columbus, Chicago & Indiana Central Railway Company. This latter railway company, by the consolidations mentioned, thus became the owner of the property pledged for the payment of the bonds in controversy, as well as of the property of its other constituent companies. The new company executed two mortgages on its entire property, one in February, 1868, the other in December of the same year. Under the first of the two, bonds to the amount of about ten million dollars were issued, and under the other, bonds aggregating less than five million dollars were issued. These two mortgages were duly recorded, and no question is made respecting their validity. In 1869 the roadway and property of this consolidated company was leased for a term of ninety-nine years, renewable forever to The Pittsburg, Cincinnati & St. Louis Railway Company, and on or about February 1, 1869, the latter company went into possession, and continued to occupy and operate the road until after its sale in 1883, upon the foreclosure of the two last-mentioned mortgages.

In 1875 actions were begun in the Circuit Court of the United States for the Southern District of Ohio, in the Circuit Court of the United States for the District of Indiana and for the Northern District of Illinois, by the trustees in the first of the two last-named mortgages to foreclose the same, to which action The Columbus, Chicago & Indiana Central Railway Company (the consolidated company that made the two last mortgages), the trustee in the mortgage last made, and the trustee in the mortgage made

to secure the bonds in controversy were each made parties. Receivers were appointed by the court, to whom the consolidated company (The C. C. & I. Central Railway Company), on May 25, 1875, conveyed the entire property covered by the mortgages, pursuant to an order of court made in the actions, but subject to the right of the lessee of the road to continue in its possession, control, and management. This deed was not recorded, and the defendant in error, Lynde, had no actual knowledge of its existence until 1891. In November, 1882, decrees were rendered in these actions for the sale of the mortgaged property.

By the terms of this decree the entire interest that The Columbus, Chicago & Indiana Central Railway Company, the mortgagor in the two last mortgages, had in the mortgaged property, and all the rights of the mortgagees in the two last mortgages, were ordered to be sold, free from all liens acquired during the litigation, but the decree expressly provided that it should not affect or prejudice prior liens, one of which was the mortgage made in 1864 to Parkhurst to secure the one thousand bonds, of which the thirty-six involved in this action are part.

In February, 1883, the property was sold under this decree to William S. Scott and his associates, who shortly thereafter conveyed it to The Chicago, St. Louis & Pittsburg Railroad Company. By a consolidation of this company with The Pittsburg, Cincinnati & St. Louis Railway Company the lessees of the road, the plaintiff in error, was formed and thereby became vested with the property embraced in the mortgage made in 1864 to secure the one thousand bonds, which, as we have seen, included those in controversy.

If the equities of the defendant in error growing out of the circumstances before noticed, under which the bonds in controversy were negotiated, were so clearly and materially stronger than those favorable to the company that made, and the company that offered them to be thus negotiated as to authorize a decree declaring them to have a

lien upon the property originally pledged for their payment, what circumstance appears in the proceedings by which this property came into the ownership of plaintiff in error that should operate to destroy this lien? The defendant in error is not chargeable with any actual neglect or omission of diligence in connection with the matter, nor of any actual notice of the proceedings.

The several transfers of the property caused by the different railroad consolidations would not affect the lien, for the statutes authorizing them expressly provide that "all rights of creditors and all liens upon the property of either of such companies shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities, and duties of either of said companies shall forthwith attach to the new company, and be enforced against it to the same extent as if such debts, liabilities, and duties had been contracted by it."

Smith, who wrongfully negotiated these bonds, continued to be president of the several companies upon their successive consolidations until about the time of the judicial sale before mentioned, and each of them became therefore successively liable for what they carelessly suffered him to do in the matter.

The circumstance that the particular railroad company that executed the mortgage and made the bonds under consideration went out of active existence before the bonds in controversy were negotiated by Smith becomes wholly immaterial in the light afforded by the provisions of this statute. The consolidated corporation succeeds not only to every debt and liability of each constituent company, but to their duties also. It therefore succeeded to all the duties pertaining to these unissued bonds that rested upon the company by whom they were made.

Respecting the effect that the judicial sale should have upon this lien, independently of the rule of *caveat emptor* that is applied to purchasers at such sales, the sale

under consideration was made under a decree that expressly provided that the lien of the mortgage that secured these bonds was not to be effected or prejudiced by the decree or sale. It is true that the purchasers at the sale supposed these bonds had not been negotiated, but they knew a thousand of the bonds had been authorized, and that their form was such that they would pass from hand to hand by mere delivery, and made no inquiry at all about them. Their production and cancellation could have been demanded, and in prudence should have been. If their production had been demanded the fact that they were outstanding would have been revealed, and the lien of the holder preserved. One who neglects so obvious a precaution should abide the consequences.

The same considerations apply to the conveyance afterwards made by the purchasers at the judicial sale to The Chicago, St. Louis & Pittsburg Railroad Company. If the purchase by Scott and his associates is not to be regarded as really made on behalf of the company to which the property was afterwards conveyed, nevertheless the latter received the deed without inquiry concerning the bonds in question, and it is chargeable with notice of the existence of the mortgage, the character of the bonds it secured, and that they might be outstanding in the hands of innocent purchasers.

Upon any adjustment of the equities growing out of the transaction we discover no circumstance that relieves the plaintiff in error from the rule of *caveat emptor*.

The doctrine of *lis pendens*, however, is invoked to defeat the lien of defendants in error.

In November or December, 1875, when the bonds in controversy were pledged by Smith for his personal obligation, and afterwards, in 1878, when the defendant in error bought them, the action heretofore referred to, brought in February, 1875, to foreclose the subsequent mortgages, was pending, and the property had been placed in the hands of receivers. Under the doctrine of *lis pendens* plaintiff in

error insists that the purchaser of the bonds was chargeable with notice of these actions, and during their pendency could acquire no lien upon property in the hands of the court. These actions were pending in the United States Court in Illinois, Indiana, and Ohio. While they embraced the property pledged to secure the payment of bonds in controversy, no relief was sought or obtained in respect of these bonds. In view of this circumstance and of the knowledge of their existence, which we have seen should be imputed to the purchaser at the judicial sale, and to the plaintiff in error, and their omission to call for the production and cancellation of any bonds that might not have been negotiated, would make the application of the doctrine of *lis pendens* to the defendant in error extremely harsh, even if the bonds were not negotiable. However, as the doctrine of *lis pendens* does not apply to negotiable paper purchased before due, in due course of business, that question requires no further consideration. Stone vs. Elliott, 11 Ohio St. 252.

The bonds in controversy were not negotiated until 1875, and if their lien dates from that event the two issues of bonds under the subsequent mortgages would be entitled to a prior lien on the property, and the aggregate amount of those two subsequent issues was greater than the sum realized from the sale of the property under the decree of foreclosure. If all that was true the defendant in error would be entitled to demand a resale of the property, for the mortgage made to secure his bonds was not affected by the decree and sale under which plaintiff in error claims title.

But the date of the lien of the bond does not depend upon the date of their original negotiation. The entire series stand upon a footing of exact equality in this respect. The first one issued has no better or earlier lien than the last one. To distinguish between and give priority of lien among a series of railway or other bonds secured by the same mortgage and in the hands of different bona fide holders according to the time each may have been issued

would contravene the manifest design of the maker. It would also be wholly impracticable, leading to interminable disputes, besides stamping upon each bond a doubt respecting the share of the proceeds of the mortgaged property that would be applied to its payment. If issued early it would be paid in full perhaps; if late it might receive nothing.

The several propositions urged upon our consideration to defeat the claim of defendant in error we find to be unsound in principle or inapplicable to the facts as they were found by the Court of Common Pleas.

Judgment affirmed.

SPEAR, J. (dissenting).

I dissent from the judgment of affirmance. My point is, that after a railroad corporation has become merged in a new company by consolidation with other companies it has not power to issue bonds and thereby create a lien on the property of the new company, even though the bonds had been duly signed and a mortgage executed and recorded before the consolidation purporting to secure a payment of the bonds. That is this case, as is shown by the sixth finding of fact at page 49 of the printed record, taken in connection with the findings recited in the majority opinion.